DATO' KADAR SHAH TUN SULAIMAN A

v.

DATIN FAUZIAH HARON

HIGH COURT MALAYA, KUALA LUMPUR B
HISHAMUDIN YUNUS J
[CIVIL SUIT NO: S3-22-223-2004]
14 NOVEMBER 2007

CIVIL PROCEDURE: *Pleadings - Striking out statement of claim - Appeal - Conflict of jurisdiction - Whether subject matter of dispute fell under jurisdiction of High Court or Syariah Court - Law of trusts - Gifts under Islamic law - Purposive approach to legislation - Whether High Court must take precedence over Syariah Court* C

CONSTITUTIONAL LAW: *Courts - Jurisdiction - Conflict of jurisdiction - Whether subject matter of dispute fell under jurisdiction of High Court or Syariah Court - Law of trusts - Gifts under Islamic law - Purposive approach to legislation - Whether High Court must take precedence over Syariah Court* D

CIVIL PROCEDURE: *Jurisdiction - High Court - Conflict of jurisdiction - Whether subject matter of dispute fell under jurisdiction of High Court or Syariah Court - Law of trusts - Gifts under Islamic law - Purposive approach to legislation - Whether High Court must take precedence over Syariah Court* E

ISLAMIC LAW: *Jurisdiction - Syariah Court - Conflict of jurisdiction - Whether subject matter of dispute fell under jurisdiction of High Court or Syariah Court - Law of trusts - Gifts under Islamic law - Purposive approach to legislation - Whether High Court must take precedence over Syariah Court* F G

This was an appeal by the defendant/wife against the decision of the senior assistant registrar dismissing the defendant's application to strike out the statement of claim of the plaintiff/husband pursuant to O. 18 r. 19(1) of the Rules of the High Court 1980. The basis of the defendant's application was that the subject matter of the dispute fell under the jurisdiction of the Syariah Court. Sometime in 1999, the plaintiff had deposited a sum of USD50,000 into the defendant's account in the Bank of Hawaii in the United States. The plaintiff averred in his statement of claim that the defendant was to hold the money on trust for the H I

plaintiff. The marriage subsequently broke down and the defendant left the matrimonial home. The plaintiff filed an application at the Syariah Court at Shah Alam to determine the validity of the marriage under the Selangor Muslim Family Enactment of 1984. In this writ action, the plaintiff sought, among other reliefs, a declaration from this court to the effect that the USD50,000 was held by the defendant on trust for his benefit.

Held (dismissing the appeal):

(1) It was clear that this court had the jurisdiction to hear the subject matter of the dispute. Based on the statement of claim, the issues were: (i) whether the defendant held the USD50,000 on trust for the plaintiff; (ii) whether the defendant had committed breach of trust when she refused to return the USD50,000 to the plaintiff; and (iii) whether the USD50,000 was, instead, a gift from the plaintiff to the defendant, as claimed by the latter. Issues (i) and (ii) concerned the law of trusts, and disputes concerning the law of trusts come within the jurisdiction of this court to determine. Hence, it follows that any dispute pertaining to the law of trusts is outside the jurisdiction of the Syariah Court. However, the defendant pointed out that the issue as to whether the USD50,000 was given by the plaintiff to her as a gift was an issue that fell within the jurisdiction of the Syariah Court since both husband and wife were Muslims. Accepting that the proposition on jurisdiction was correct in law, the present dispute could not be taken out from this court and transferred to the Syariah Court because under the Federal Constitution ('FC'), the Syariah Court has no jurisdiction to hear disputes pertaining to the law of trusts. If the case were transferred to the Syariah Court for determination of the issue pertaining to the gift, the plaintiff, at the Syariah Court, would raise the issue that the money was given to the defendant, not as a gift, but to be held on trust for his benefit. As this issue of the creation of a trust under the ordinary law (or civil law) was intertwined with the issue pertaining to the giving of a gift under Islamic law, the Syariah Court must also determine whether a trust was created – but then this is a matter which the Syariah Court is jurisdictionally incompetent to decide. Since the dispute between the parties revolved around a specific sum of money, it did not make sense to suggest that the issue concerning the law of trusts be decided by this court and that the issue

concerning the law of gifts under Islamic law be decided by the Syariah Court. This was because although the issues were different, they were not severable since the subject matter, the USD50,000, was the same and the evidence tendered by both sides would also be the same, no matter where the forum was. *Latifah Mat Zin v. Rosmawati Sharibun & Anor* (dist). (paras 7, 8, 9, 10 & 11)

(2) Where there is an issue of competing jurisdiction between the civil court and the Syariah Court, the proceedings before the High Court of Malaya or the High Court of Sabah and Sarawak must take precedence over the Syariah courts as they are superior civil courts, being High Courts duly constituted under the FC. Syariah courts are mere State courts established by State law, and under the FC these State courts do not enjoy the same status and powers as the High Courts established under the Courts of Judicature Act 1964. Indeed, the High Courts have supervisory powers over the Syariah Courts just as the High Courts have supervisory powers over other inferior tribunals like, for instance, the Industrial Court. Of course, cls. (1) and (1A) of art. 121 of the FC are pertinent, but these provisions cannot be interpreted literally or rigidly. At times, common sense must prevail and in interpreting them, the purposive approach must be adopted. (paras 15 & 16)

(3) In conclusion, this court could hear this case because the issue relating to the law of trusts was clearly within its jurisdiction. This action must be tried and determined by this court, although it is foreseeable that at the trial the issue of gifts under Islamic law would be raised by the defendant. In the event that happens, this court would not decline jurisdiction to hear it but would proceed to hear and to make a finding or ruling on the issue. At the trial, the defendant may, if she so wishes, call an expert on Islamic law to prove that a valid gift under Islamic law had been made by the plaintiff to the defendant. (para 17)

Case(s) referred to:
Latifah Mat Zin v. Rosmawati Sharibun & Anor [2007] 5 CLJ 253 FC ***(dist)***

Legislation referred to:
Federal Constitution, art. 121(1), (1A)
Rules of the High Court 1980, O. 18 r. 19(1)

For the plaintiff - Dinesh Nair; M/s How, Zul & Low
For the defendant - SY Wang; M/s Michael Chai & Co

Reported by Suresh Nathan

JUDGMENT

Hishamudin Yunus J:

[1] Enclosure 20 is an appeal by the defendant against the decision of the learned senior assistant registrar who had dismissed the defendant's application to strike out the plaintiff's statement of claim pursuant to O. 18 r. 19(1) of the Rules of the High Court 1980.

[2] The basis of the defendant's application is that the subject-matter of the dispute falls under the jurisdiction of the Syariah Court.

[3] I have dismissed this appeal with costs.

[4] The plaintiff and defendant are husband and wife. They were married in Jakarta. Some time in 1999 the plaintiff had deposited a sum of USD50,000 into the defendant's account at the Bank of Hawaii in the United States. It is averred by the plaintiff at para. 8 of the statement of claim that the defendant was to hold the money on trust for the plaintiff. In June 2003 the marriage between the plaintiff and the defendant broke down and the defendant left the matrimonial home. The plaintiff filed an application at the Syariah Court at Shah Alam to determine the validity of the marriage under the Selangor Muslim Family Enactment of 1984.

[5] In this writ action, the plaintiff/husband seeks, among other reliefs, a declaration from this court to the effect that the USD50,000 is held by the defendant/wife on trust for his benefit.

[6] I am unable to accept the argument of the defendant that this court has no jurisdiction to hear the subject matter of the dispute, and that the subject-matter of the dispute comes within the jurisdiction of the Syariah Court.

[7] It is clear to me that this court has the jurisdiction to hear the subject-matter of the dispute. In determining the nature of the subject-matter of the dispute between the parties I must have regard to the statement of claim. Based on the statement of claim the issues are:

(1) whether the defendant/wife held the USD50,000 on trust for the plaintiff/husband;

(2) whether the defendant/wife had committed a breach of trust when she refused to return the USD50,000 to the plaintiff/husband; and

(3) whether the USD50,000 was, instead, a gift from the plaintiff/husband to the defendant/wife, as claimed by the latter.

[8] Issues (1) and (2) above concern the law of trust. It appears not to be disputed that disputes concerning the law of trust comes within the jurisdiction of this Court to determine (see item 4(e)(i)('equity and trust') of the Federal List (List I) of the Ninth Schedule of the Federal Constitution). Hence, it follows that any dispute pertaining to the law of trust is outside the jurisdiction of the Syariah Court.

[9] However, it is pointed out by the learned counsel for the defendant/wife that the issue as to whether the USD50,000 was given by the plaintiff/husband to the defendant/wife as a gift is an issue which falls within the jurisdiction of the Syariah Court since both husband and wife are Muslims. The learned counsel for the defendant refers to paragraph (ii)('gifts or succession') of item 4(e) of the Federal List (List I) and item 1 of the State List (List II) of the Ninth Schedule of the Federal Constitution.

[10] Now, accepting that the above propositions on jurisdiction are correct in law, still the present dispute cannot be taken out from this court and be transferred to the Syariah Court. This is because under the Federal Constitution the Syariah Court has no jurisdiction to hear disputes pertaining to the law of trust. If I were to transfer this case to the Syariah Court for the Syariah Court to determine the issue pertaining to the gift, at the Syariah Court the plaintiff/husband will raise the issue that the money was given to the defendant/wife, not as a gift, but to be held on trust for his benefit. As this issue of the creation of a trust under the ordinary law (or civil law) is intertwined with the issue pertaining

to the giving of a gift under Islamic law, the Syariah Court must also determine whether a trust was created – but then this is a matter which the Syariah Court is jurisdictionally incompetent to decide. So, where do we go from here?

[11] As the dispute between the parties revolves around a specific sum of money – the USD50,000 – it does not make sense to suggest that the issue concerning the law of trust be decided by this court and that the issue concerning the law of gift under Islamic law be decided by the Syariah Court (but to be fair to the defendant, her counsel makes no suggestion to this effect). It does not make sense because although the issues are different, they are, however, not severable; and they are not severable because the subject matter is the same: the USD50,000; and the evidence that will be tendered by both sides will also be the same – no matter where the forum is.

[12] By reason of the peculiarity of the present case, the question arises: which court is the appropriate court to hear the dispute? The Constitution, in particular art. 121, unfortunately, is not clear on this issue. In a sense, it can be said here that there is a 'conflict' of jurisdiction between the ordinary courts and the Syariah Court. Hence it is left to this court to resolve this difficult issue.

[13] In the Federal Court case of *Latifah bte Mat Zin v. Rosmawati bt Sharibun & Anor* [2007] 5 CLJ 253 Abdul Hamid Mohamad FJ (as he then was) said:

> Until the problem is solved by the Legislature, it appears that the only way out now is, if in a case in the civil court, an Islamic law issue arises, which is within the jurisdiction of the Syariah Court, the party raising the issue should file a case in the Syariah court solely for the determination of that issue and the decision of the Syariah Court on that issue should then be applied by the civil suit in the determination of that case. But, this is only possible if both parties are Muslims. If one of the parties is not a Muslim such an application to the Syariah Court cannot be made. If the non-Muslim party is the would be plaintiff, he is unable even to commence proceedings in the Syariah Court. If the non-Muslim party is the would be defendant, he would not be able to appear to put up his defence. The problem persists. Similarly, if in a case in the Syariah Court, a civil law issue eg, land law or companies law arises, the party raising the issue should file a case in the civil court for the determination of that issue which decision should be applied by the Syariah Court in deciding the case.

[14] With respect I do not think the above ruling can be applied in all cases. Certainly it cannot be applied to the facts and issues of the present case where the issues are intertwined and it would be artificial or impractical to compartmentalize the issues as a civil court issue and as a Syariah Court issue and have them tried separately by different forums. For, the Syariah Court issue (the 'gift' issue) inevitably would be raised by the defendant/wife in the civil court, if the case were to be tried in the civil Court. Likewise, the civil court issue (the 'trust' issue) would inevitably be raised by the plaintiff/husband at the Syariah Court if the matter were to be tried by the Syariah Court. Although the issues are different, they are not severable and they revolve around the same subject-matter (the USD50,000) and on the same evidence (that would be tendered). Accordingly, I must regard the present case as an exception to the ruling made by Abdul Hamid Mohamad FJ in *Latifah bte Mat Zin*. I propose not to decline jurisdiction to hear the case in full.

[15] In my judgment, where there is an issue of competing jurisdiction between the civil court and the Syariah court, the proceedings before the High Court of Malaya or the High Court of Sabah and Sarawak must take precedence over the Syariah courts as the High Court of Malaya and the High Court of Sabah and Sarawak are superior civil courts, being High Courts duly constituted under the Federal Constitution. Syariah courts are mere State courts established by State law, and under the Federal Constitution these State courts do not enjoy the same status and powers as the High Courts established under the Courts of Judicature Act 1964. Indeed, the High Courts have supervisory powers over Syariah Courts just as the High Courts have supervisory powers over other inferior tribunals like, for instance, the Industrial Court.

[16] Of course, I am constantly conscious of (and, perhaps, troubled by) cls. (1) and (1A) of art. 121 of the Federal Constitution. But these provisions cannot be interpreted literally or rigidly. At times common sense must prevail. In interpreting them the purposive approach must be adopted.

[17] In conclusion, this court has the jurisdiction to hear this case because the issue relating the law of trust is clearly within the jurisdiction of this court. This action must be tried and determined by this court, although it is foreseeable that at the trial

A the issue of gifts under Islamic law would be raised by the defendant. In the event that the issue is raised, this court will not decline jurisdiction to hear it but will proceed to hear and to make a finding or ruling on the issue. At the trial, the defendant may, if she so wishes, call an expert on Islamic law to prove that under
B Islamic law a valid gift had been made by the plaintiff to the defendant.

[Appeal dismissed with costs.]

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